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In The

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS AND THE ASSOCIATION FOR SUPERVISION & CURRICULUM DEVELOPMENT AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

Amici[1/] are the American Federation of School Administrators and the Association For Supervision & Curriculum Development. They are national organizations of educators and administrators, charged with teaching a complete, well-rounded, public school curriculum to the roughly 40 million school-age children attending this nation's public schools. In carrying out their educational tasks, *amici* are also obliged to ensure the safety of the children and adolescents entrusted to their care, and to ensure the protection of their constitutional and civil rights. *Amici* seek to ensure that each public school curriculum (and extra-curriculum) reflects, to the extent appropriate and to the extent constitutional, the needs and desires of the particular community in which the school lies. They also have a duty to protect the academic freedom and religious freedom of the teachers employed by the public schools. *Amici* urge review and reversal of the decision below, *Bauchman* v. *West High School*, 132 F.3d 542 (10th Cir. 1995), because that decision improperly dismantles the wall of separation between church and state in the public schools, and will make their discharging of these varying goals and responsibilities considerably more difficult, if not impossible. All parties have consented to the filing of this Brief and their letters of consent have been filed with the Court.

SUMMARY OF ARGUMENT

Citing the "confusion" and "inconsistency" in this Court's Establishment Clause jurisprudence, and apparently as a consequence misconstruing the pertinent precedents, the Tenth

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[1/] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Circuit in *Bauchman* effectively dismantled the wall of separation between church and state in the public schools, allowing a public school teacher to continue a 20-year program of proselytism and harassment of religious dissenters.

In dismissing Ms. Bauchman's claims and denying her leave to amend her complaint, the Tenth Circuit relied on numerous incorrect statements of the controlling law. Most notably, it dispensed with the first two prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), altogether, on the ground that the purpose prong of *Lemon* "is an unworkable standard that offers no useful guidance to courts," 132 F.3d at 552, substituting a watered-down version of the endorsement test, and then relying on the proposition that the Establishment Clause is violated only if the State has *no* plausible secular purpose for its actions. *Id.* at 554. It further suggested that the inquiry into "purpose" does *not* entail consideration of the government actor's subjective intent. *Id.* at 560. Further, the Tenth Circuit applied a "reasonable observer" standard in assessing whether the effect of Mr. Torgerson's actions was to advance religion. *Id.*

These are clear errors of law. *Amici* submit that despite the fragmentation in the governing Supreme Court precedent, Mr. Torgerson's conduct was unquestionably beyond the pale. The Court should make it perfectly clear that Courts of Appeals may not hide behind conflicting *dicta* in the governing jurisprudence in order to sanction proselytism.

ARGUMENT

Amici adopt the statement of the case in the Petition For Writ of Certiorari filed by Rachel Bauchman on April 27, 1998. They write separately to emphasize one aspect of the factual makeup of the case.

The Tenth Circuit's most fundamental error was its view that it fell within an existing line of cases involving "religious choral music." *See Doe* v. *Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995); *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980). This case, however, is *not* about the constitutionality of the inclusion of religious songs in a choral curriculum. It is about the constitutionality of proselytism in a public high school setting.

A. THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE, WHICH THE TENTH CIRCUIT CHARACTERIZED AS "MUDDLED," IS IN NEED OF CLARIFICATION.

This Court's Establishment Clause jurisprudence is often criticized for a lack of clarity and consistency. *See*, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (deploring the Court's "embarrassing Establishment Clause jurisprudence"); *Rosenberger* v. *University of Virginia*, 515 U.S. 819, 861 (1996) (Thomas, J., concurring) (characterizing the Court's Establishment Clause jurisprudence as in "hopeless disarray"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (observing that jurisprudence may be in need of "[s]ubstantial revision").

The fragmentation of the Court's decisions in this area, *see*, *e.g.*, *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997) (Opinion of the Court delivered by O'Connor, J., in which Rehnquist, C.J., and Scalia, Kennedy, and Thomas, JJ, joined) (dissent of Souter, J., in which Stevens and Ginsburg, JJ, joined, and in which Breyer, J., joined as to Part II) (dissent of Ginsburg, J., in which Stevens, Souter, and Breyer, JJ, joined), and the seeming-adoption of a multitude of potentially applicable tests

for the public school context,[2] have prompted Courts of Appeals addressing religion in the public schools to preface their analyses with remarks on the confusion in the governing law. *See*, *e.g.*, *Bauchman*, 132 F.3d at 551 (referring to the "existing, muddled Establishment Clause precedent"). In short, the "confusion" and "muddle" in the Supreme Court cases — a natural, but unfortunate, result of fragmentation in the Court's opinions — has seemingly left some Courts of Appeals with the impression that they have a wide latitude of choice among the Court's *dicta* in this critical area of First Amendment law, allowing them to acquiesce in impermissible breaches of the wall of separation between church and state. The decision of the Tenth Circuit below is illustrative.

B. THE TENTH CIRCUIT IN *BAUCHMAN* MISCONSTRUED THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

1. The Tenth Circuit's approach to the "purpose" inquiry was fundamentally flawed.

This case presents fundamental issues as to the nature of the "purpose" inquiry in Establishment Clause cases: whether the "endorsement" test has replaced the *Lemon* test; whether a defendant need only articulate some plausible secular

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[2] The Courts of Appeals appear to believe there are three "separate" tests of constitutionality under the Establishment Clause: the *Lemon* test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), an endorsement test stemming from Justice O'Connor's concurrence in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and a coercion test stemming from Justice Kennedy's opinion in *Lee* v. *Weisman*, 505 U.S. 577 (1992). *See*, *e.g.*, *Duncanville*, 70 F.3d at 406 (using all three "tests" to affirm an injunction against a school and its employees from leading, encouraging, promoting, and participating in prayers with or among students during curricular or extracurricular activities).

purpose; how a state actor's intent is to be probed by a reviewing court; and what sort of factual allegations on the issue of purpose suffice to defeat a motion to dismiss in federal court. The Tenth Circuit's approach to the purpose inquiry, in which it dispensed with *Lemon*, ruled that the Establishment Clause is violated only when the conduct in question is wholly motivated by religious considerations, and concluded that the Clause does not require a subjective inquiry into the intent of the state actor whose conduct is at issue, was plainly wrong.

a. The "endorsement" test neither replaces nor eviscerates the purpose prong of the *Lemon* test.

Writing that the endorsement test "is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims," the Tenth Circuit chose to "apply both the purpose and effect components of the refined endorsement test" when evaluating Ms. Bauchman's claim. 132 F.3d at 552. It then held her to a requirement of showing that Mr. Torgerson had *no* secular purpose for selecting songs with religious content and having the choir perform in religious venues (thus conveniently dispensing with the remaining factual allegations relating to proselytism). Finding a number of "plausible" secular purposes (outside the record), the court ruled that Ms. Bauchman's complaint "fail[ed] to state an Establishment Clause claim under the purpose component of the endorsement test." *Id.* at 555.

The Tenth Circuit's analysis reflects a fundamental misunderstanding of the role of the three prongs of *Lemon*. As the Court wrote in *Lemon* itself, to be constitutional, a challenged statute (or, here, a state actor's conduct) must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not

foster excessive entanglement with religion. *See Lemon*, 403 U.S. at 613. This is nothing more than an articulation of a straightforward and traditional "purpose and effect" inquiry, and a recognition of the clause's ban on government "intermeddling" in the affairs of religion.

The endorsement inquiry articulated in *Lynch* by Justice O'Connor (but not accepted as a substitute for *Lemon* by the Court)[3] does *not* dispense with this traditional inquiry into the purpose and effect of a challenged government action. Indeed, the Tenth Circuit erred in further "watering down" the endorsement test by dispensing with the subjective inquiry into actual purpose. As the dissent in *Bauchman* noted, "Justice O'Connor, the originator of the endorsement test, believes the proper focus . . . is the subjective purpose of the governmental actor." 132 F.3d at 565 (Murphy, J., concurring in part and dissenting in part). Judge Murphy concluded from his own review of the post-*Lynch* cases that "a majority of the Court would invalidate any governmental action subjectively intended to endorse religion." *Id.*

In short, contrary to the ruling of the Tenth Circuit, the *Lemon* test requires a rigorous examination of a government actor's subjective purpose and his actual effect; and the so-called endorsement test (which in any event does not "replace" *Lemon*) requires nothing less.

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[3] *See, e.g., Allegheny*, 492 U.S. at 669 (Kennedy J., concurring in part and dissenting in part) (joined by Rehnquist, C.J., and White and Scalia, JJ.) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice.").

b. There is no basis for the Tenth Circuit's refusal to consider Mr. Torgerson's actual intent.

The Tenth Circuit next took the puzzling position that "any attempt to use allegations regarding Mr. Torgerson's past conduct to evidence a continual controlling unexpressed or psychological motive to further a religious purpose by selecting religious songs and religious performance venues oversteps . . . pragmatic limits on the nature of our inquiry into the 'actual' *purpose* of the challenged conduct. Put simply, our examination must stop short of an attempt to discern a defendant's psychological *motives* vis-à-vis his past conduct, underlying belief system or religious character." 132 F.3d at 560. The majority continued, "Torgerson's 'psychological motive' in selecting the Choir's repertoire and performance venues is constitutionally irrelevant in determining whether he acted with the 'actual purpose' of advancing religion." *Id.* at 563.

The Tenth Circuit's erroneous dichotomy between "subjective motive" and "objective purpose" reflects its misreading of a comment in the *Mergens* decision (which in any event dealt with a statute, rather than individual conduct). As Justice Stevens observed in that case, the government may not act with the personal subjective view "that it would be desirable for people to be religious or to adhere to a particular religion." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 286 n.21 (1990) (Stevens, J., dissenting). At the same time, the Establishment Clause is not ordinarily concerned with "whether the legislature [or a government actor] itself behaved religiously." *Id.* *Amici* agree that the Clause does not require an inquiry into whether Mr. Torgerson himself acted out of religious fervor (*i.e.*, whether he believed his own religion compelled him to the actions in question). However, the Clause unquestionably required the Tenth Circuit to determine

whether Mr. Torgerson subjectively intended to convert, to further religion, to preach, or to proselytize.[4] And the allegations in Ms. Bauchman's amended complaint unequivocally point to an intent to proselytize.[5]

c. Articulation of some "plausible" secular purpose is insufficient to pass Establishment Clause review.

The Tenth Circuit's position that the Establishment Clause is only violated when the conduct in question is wholly motivated by religious considerations — *i.e.*, when the reviewing court can identify no plausible secular purpose, 132 F.3d at 553-55 — is incorrect as a matter of law.

Although *dicta* in *Lynch* suggest that a plaintiff must show that the defendant's actions were "motivated wholly by

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[4] The distinction is between "why" a person takes a step, and "to what end" he takes that step. Both are subjective inquiries. The Establishment Clause may well forbid the former inquiry (was he acting religiously, *i.e.*, did Mr. Torgerson believe he would suffer eternal damnation if he failed to proselytize, or did he merely believe he would not be fulfilling his duties as a member of the Mormon Church); however, it *requires* the latter inquiry (did he intend to convert and proselytize, or did he intend something more innocuous).

[5] *See, e.g.*, Amended Complaint (AC) ¶ 16b (forcing students to attend offering of prayers and sacraments); ¶ 16g (frequent discussion of religions content of songs in order to advocate his own beliefs); ¶ 16k (invoking prayers during choir tours); ¶ 16e (frequent performance at religious venues); ¶ 16l (instructing class that they should understand and accept the religious message of the songs); *see also Petition* at 3-4 (Torgerson admitted his preference for Mormon students; the class under Torgerson's direction regularly participated in Mormon worship services; Torgerson wrote to choir parents that he had "trouble with this separationist concept"; and he instructed his class that a true appreciation of music comes through religious experience).

religious considerations," 465 U.S. at 680, the author of the endorsement test has herself taken a different position. *See id.* at 690-91 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.").

To be sure, the Tenth Circuit's position draws comfort from Justice O'Connor's concurrence in *Wallace* v. *Jaffree*, where she wrote that "the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited," and that "[i]f a legislature expresses a plausible secular purpose . . . , then courts should generally defer to that stated intent." 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). This *dictum*, however, reflects merely the conventional wisdom that (federal) courts should be deferential to (federal and state) legislatures regarding the purpose of legislation. Deference is inappropriate and unnecessary when a case involves instead the behavior of an individual state actor. Concerns expressed by Justice Scalia and Chief Justice Rehnquist about discerning the motive of individual legislators, *see*, *e.g.*, *Aguillard*, 482 U.S. at 625, 632-33, 636-38 (Scalia, J., dissenting), simply do not apply in the context of an individual actor who can be cross-examined. *See also* Charles Black, Structure and Relationship in Constitutional Law 77-93 (1969) (arguing that review of articulated purpose should become less deferential the smaller the government body in question). Moreover, deference to a state's articulation of secular purpose is belied by the Supreme

Court's actual practice. The Court has repeatedly made it plain that a "sham" secular purpose will *not* be tolerated.[6/]

Amici contend that the proper result at the initial pleading stage was articulated in *Board of Education* v. *Pico*, 457 U.S. 853 (1982), and continues to apply in "mixed motive" cases. A complaint survives dispositive motions if it alleges facts showing any actual (subjective) improper purpose behind the challenged actions. In *Pico*, for instance, the plaintiff's factual allegation of an actual improper purpose for the school board's removal of books from the school library in question (disagreement with the social and political views expressed therein) was deemed sufficient to defeat a motion to dismiss, despite the obvious possibility of other plausible explanations. Under the *Pico* precedent, Ms. Bauchman's allegations of improper purpose are more than adequate to keep her case in federal court and to require a trial on the issue. *See id.* at 875 (noting that the "evidence at most creates a genuine issue of material fact on the critical question of the credibility of petitioners' justifications for their decision").

[6/] *See e.g.*, *Aguillard*, 482 U.S. at 586-87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."); *Epperson* v. *Arkansas*, 393 U.S. 97, 108 (1968) (striking down anti-evolution statute that forbade public school teachers from teaching theory of evolution, citing newspaper advertisements and letters supporting adoption of the statute, and observing that it is "clear that fundamentalist sectarian conviction was and is the law's reason for existence"). Both of these decisions entailed a fairly rigorous judicial inquiry into the actual purpose of the measures at issue.

d. The Tenth Circuit's purpose analysis undermines *amici*'s ability to protect minority and dissenting students.

The Tenth Circuit's approach to the purpose inquiry tells teachers that they may attempt to convert, and that they may preach, discriminate, and harass, so long as they *also* have a plausible (not even an "actual") secular goal in so doing. It tells administrators that they should not bother to police classrooms for harassment, and tells principals that it would be a waste of time to sanction teachers for proselytism. Indeed, under the "any plausible secular purpose" standard, students and parents have little incentive to report arguably unconstitutional incidents to the authorities. This casual approach to protection of fundamental constitutional rights — extreme deference to any plausible explanation for harassing behavior — would be flatly unacceptable in the context of racial harassment and discrimination; it should be equally unacceptable in the context of proselytism.

2. The Tenth Circuit's approach to the "effect" inquiry was also clearly incorrect.

a. The Establishment Clause requires an inquiry into the purpose *and* the effect of a challenged action.

Amici do not suggest that a state action violates the Establishment Clause simply because the motives of the state actors in question were improper. If Mr. Torgerson had intended to advance Christianity in his classroom but had been wholly ineffective — not in fact advancing it, not in fact endorsing it, and not in fact pushing dissenting adolescents to the social outskirts of his classroom — then although his actions would have been improper, the clause might not have

been contravened. (One might call this "harmless error.")[2/] This is not such a case. Ms. Bauchman has made a clear showing that Mr. Torgerson's motives were improper, *and* — as explained below — that the effect of his actions was impermissible.

b. The Tenth Circuit was incorrect to hold Ms. Bauchman to a "reasonable observer" standard on the question of the effect of Mr. Torgerson's actions.

Another issue in the case is whether the "effect" of a challenged practice is to be measured by an objective or subjective standard. The Tenth Circuit was plainly wrong in its approach to the issue, which was to judge by a reasonable observer standard and to discount Ms. Bauchman's allegation of the effect of Mr. Torgerson's actions on the grounds that she was describing the "subjective effect of the curriculum on [herself]." 132 F.3d at 555.

The "reasonable observer standard" finds limited support in the writings of Justice O'Connor. *See Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J. concurring) (stating that "the

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[2/] To say that improper purpose alone will not prove an Establishment Clause violation is not to say that it is irrelevant. Take by way of analogy the inclusion of Mark Twain's *Huckleberry Finn* in a sixth grade public school classroom. Imagine that the sole black pupil in the class were to complain that the inclusion of the book and, particularly, class discussions and enactment of certain portions of the book demeaning to blacks, made her feel "second class." Absent discriminatory intent, an equal protection claim would not lie. *Washington* v. *Davis*, 426 U.S. 229 (1976). But if there were evidence that the teacher's intent in assigning the book and assigning "skits" from the storyline was, precisely, to stamp the black students with the *stigma* of the past (a "badge" of "slavery"), then the equal protection claim would be complete.

endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe"). And it may make sense in the sort of Establishment Clause challenges wherein it was first articulated — cases involving government symbols that give the appearance of institutional endorsement of religion. *See, e.g., Allegheny,* 492 U.S. at 595 (Blackmun, J.) (suggesting endorsement test is "a sound analytical framework for evaluating governmental use of religious symbols").

But the "reasonable observer standard" is wholly inconsistent with the "insider/outsider doctrine" also articulated by Justice O'Connor. Under this principle, which reflects in part the religious persecution to which our founding generations had been exposed in the Old World, government action is invalid under the Establishment Clause if it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. This is inherently and inescapably a subjective inquiry, and the facts of this case suggest precisely this insider/outsider effect.[8/]

If the "effect" inquiry is to be meaningful in a case, it must be situationally specific. In this case, the inquiry must be the effect of Mr. Torgerson's practice on a "reasonable adolescent religious dissenter" under the circumstances *and* on Rachel Bauchman in particular. *See* Note, *Religion and the*

[8/] *See, e.g.*, AC ¶ 16d (application form for choir class inquiring about religious affiliation); ¶ 16o (berating dissenting students); ¶ 17d (inciting Mormon parents and children to punish and ostracize Ms. Bauchman); ¶ 17e (suggesting Ms. Bauchman leave choir class).

State, 100 Harv. L. Rev. 1606, 1648 (1987) ("[If the test] is governed by the perspective of the majority, it will be inadequately sensitive to the impact of government actions on religious minorities, thereby in effect basing the protection of religious minorities on the judgment of the very majority that is accused of infringing the minority's religious autonomy. If the Establishment Clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent."); *see also* Laurence H. Tribe, American Constitutional Law § 14-5 at 1177 (2d ed. 1988) ("At least concerning public schools, the endorsement question ought to be asked from two perspectives: that of an objective observer sympathetic to free exercise concerns, and that of the students involved.").

The Tenth Circuit's abandonment of a subjective effect inquiry eviscerates the basic proposition that the Establishment Clause promises protection from majoritarian oppression. It would render meaningless efforts by *amici* to police the schools for harassment of individual students by teachers. It would deny *amici* their ability to respond to complaints from individual students, and indeed provides no guidance to *amici* when faced down by religious majorities seeking to impose a sectarian agenda in the local public schools.

3. The notion, seemingly embraced by the Tenth Circuit, that unconstitutional coercion cannot occur outside the context of a formal prayer exercise, was also erroneous.

The Tenth Circuit declined to examine the coerciveness of Mr. Torgerson's religious agenda, 132 F.3d at 552 n.8, essentially on the theory that the case was not a "school

prayer" case. This reflects a misunderstanding of the Court's coercion analysis. While a plaintiff need not prove coercion in order to prove an Establishment Clause violation, coercion *can* occur in the public schools outside the context of a formal religious exercise, and Ms. Bauchman made a plain showing of coercion.

The First Amendment "guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992). *See also Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *see also Wallace*, 472 U.S. at 60 n.51 ("This comment has special force in the public school context where attendance is mandatory."). The observation that religious coercion has no place in our system of separated church and state, however, does not mean that Establishment Clause plaintiffs must always allege and prove coercion. Indeed, as Justice O'Connor observed in the *Allegheny* case, a rule of law that "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community." *Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part and concurring in the judgment, joined by Brennan and Stevens, JJ.)

In any event, Ms. Bauchman presented considerable evidence that Mr. Torgerson's religious agenda was coercively

imposed.[9] Her ability to excuse herself from choir (*i.e.*, because the class was elective and because she was given the option of sitting out of religious programs while still receiving an A) cannot as a matter of law wipe out the improper purpose and effect of Mr. Torgerson's proselytism. Permitting the excusal option to negate Establishment Clause violations effectively amounts to a rule that individual school teachers and the school systems may preach and proselytize in class, so long as the classes are elective. This is, of course, flatly inconsistent with the rulings in *Edwards* v. *Aguillard*, 482 U.S. 578 (1987), and *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). In both of these cases, the Court made it clear that religious activities on public school premises from which students may excuse themselves are — despite the excusal option — impermissible.[10]

Moreover, as Justice Brennan's detailed concurrence in *Schempp* explains, the excusal option does not remedy the Establishment Clause problem in the public school systems precisely because school children in particular are highly susceptible to peer group pressure where important norms and values are involved. *Abington School District v. Schempp*, 374 U.S. 203, 290-91 (1963). *See also McCollum* v. *Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("That a child is offered an alternative may reduce

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[9] *See, e.g.*, AC ¶ 16b (requiring prospective students to identify their religion on class application forms); ¶ 16h (stating he disagreed with Supreme Court decisions forbidding advocacy of religion in public schools); ¶ 16n (suggesting students who dislike prayer at graduation should "plug their ears").

[10] Portions of *Ball* were overruled last term, *see Agostini* v. *Felton*, 117 S. Ct. 1997 (1997), but the jurisprudential evolution in question involved the extent to which "Shared Time" programs constitute aid in furtherance of religion. The excusal option was not at issue.

the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.").

C. THE TENTH CIRCUIT DECISION, IF ALLOWED TO STAND, WILL MAKE COMPLIANCE WITH THE LAW MORE DIFFICULT FOR THE *AMICI*.

1. As a matter of principle, the wall of separation between church and state should be impenetrable in the public schools.

Any intrusion of church into the public schools is inconsistent with the basic mission of the public school system. Public education is designed to prepare the young for fully-educated participation in the civic democracy, to educate them in secular and worldly subjects, so that they may make informed decisions as adults. *See Everson* v. *Board of Education*, 330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting) (noting that the public schools are organized "on the premise that secular education can be isolated from all religious teaching so that the school can impart all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion" and that "[t]he assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion"). These goals cannot be effectuated if the school system has become a machine for the advancement of particular religions, or if internal strife and division along religious lines has become a primary feature of the classroom. *See Schempp*, 374 U.S. at 241-42 (Brennan, J., concurring) (noting that "the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort — an atmosphere in which children may assimilate a heritage common to all American groups and religions").

Further, intrusion of church into the public schools is particularly problematic given the unique susceptibility of children and adolescents to peer pressure when social norms are involved. Indeed, this fact exacerbates and magnifies the possibility of violations of religious liberty and the possibility of coercion. This Court has consistently and correctly recognized that children and adolescents are uniquely subject to the influence of teachers, administrators, and other students. They are particularly vulnerable to policies exhibiting a preference for one religion or another. *See Ball*, 473 U.S. at 390 ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."). The risk of undue influence warrants especial vigilance on the part of educators and on the part of the courts regarding any practice that might plausibly be unconstitutional.

2. As a practical matter as well, the wall of separation between church and state should be impenetrable in the public schools, and the ban on proselytism should be absolute.

Court decisions that permit "some" intrusion of religion, on a complicated set of facts, leave the door open for considerable disagreement at the student, school, school board, parent, and community level about "what else is permissible." Thus, for instance, if the same facts were to arise in a different high school in the Tenth Circuit, subject to just slightly nuanced variation — for example, all of the same alleged facts ***plus*** the choir's adoption of "The Lord Bless You And Keep You" as a "theme song"; or all of the same alleged facts ***minus*** the covert religious tour ***but plus*** the assignment of even more contemporary religious pop songs; or all of the same facts ***and also*** choir class being mandatory for all

students — *amici* would find themselves with conflicting obligations and responsibilities. They would be forced to predict the results of a lawsuit brought by a dissenting student, in the wake of unstable Tenth Circuit precedent clearly out of line with the Supreme Court precedent,[11/] while balancing (a) the need to protect students from harassment with (b) the need to ensure education is well-rounded and complete and (c) the need to protect the academic freedom of teachers and respond fairly to the requests of the community regarding curricular and extra-curricular decisions. How, in the wake of the *Bauchman* decision, could the *amici* effectively assess any of the three examples above?

Amici have specific responsibilities with respect to religious freedom and the church-state clauses. These include intervening in teacher-on-student or student-on-student coercive situations, maintaining a constant alert for proselytism, warding off conflict or strife on the basis of religious belief within the school (and within the community regarding the school), and maintaining a constant alert for harassment of and discrimination against students in a religious minority. *Amici* submit that ambiguities and fragmentation in the Court's Establishment Clause cases permit wildcard decisions like *Bauchman*, and leave school teachers and administrators without guidance in matters of religion. Reversal of the Tenth Circuit decision and clarification of the controlling Establishment Clause law are seriously needed.

[11/] The Tenth Circuit precedent is particularly unstable given the split panel and the subsequent evenly-divided vote on Petitioner's request for rehearing. *Amici* have little confidence that *Bauchman* lays out a reliable "rule of law" for even the Tenth Circuit.

CONCLUSION

The Court should grant the writ of certiorari because the case was decided wrongly, because the Court's Establishment Clause jurisprudence is in need of clarification if it is to provide guidance to the lower courts and to public school teachers and administrators, and because maintaining the wall of separation is vital in the public school system.

Respectfully submitted,

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